Filed 4/8/10 In re D.D. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re D.D., a Person Coming Under the Juvenile Court Law.	
FRESNO COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. K.G., Defendant and Appellant.	F058226 (Super. Ct. No. 07CEJ300191-1) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Jane Cardoza, Judge.

Michelle L. Jarvis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kevin Briggs, County Counsel, William G. Smith, Deputy County Counsel, for Plaintiff and Respondent.

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PROCEDURAL AND FACTUAL HISTORIES

This is an appeal from an order establishing the permanent plan in a dependency action and denying the mother's Welfare and Institutions Code[1] section 388 petition (388 petition). The child was removed from her mother's custody after suffering a massive head trauma while in the care of the mother's live-in boyfriend. The injury was determined to be nonaccidental. At the jurisdictional hearing, the mother entered a plea of no contest to the allegation that she had failed to protect the child. Dependency was established and the child was removed from her mother's custody and, after release from the hospital, was placed in a foster home for medically fragile children. Respondent Fresno County Department of Children and Family Services (department) supervises the child's care.

The child was three and a half years old at the time of the injury. The detention report describes the child's condition when she arrived at the hospital as "dilated fixed left pupil, a depressed level of consciousness, rigid and had to be intubated and … found to have a large and severe left subdural hematoma with effacement of the left lateral ventricles as well as a shift of the brain contents from left to right that required a craniotomy to evacuate the subdural hematoma." There were also older fading bruises to her right buttock area. It was a near fatal injury.

Reunification services were ultimately terminated for the mother and the biological father, who had not played a role in the child's life. The child remained in the foster home and progressed well in the foster parents' care. In August 2008, it was reported that the child was below the cognitive level of a two and a half year old. It was further reported that the child had suffered "right-sided hemiplegia, significant cognitive, visual and developmental impairment" from which she might never recover. It was

[1]All further references are to the Welfare and Institutions Code unless otherwise noted.

reported that the child's general neurodevelopmental status was diminished, that she had no stranger anxiety, and that she was unaware of basic safety issues. The child had trouble with her balance and wore a helmet and leg braces to help her walk. She required constant supervision and a very structured environment. She was in a special education program and was participating in physical, occupational, and speech therapy. Although there had been continued improvement, the medical profession could not predict how much of her former developmental status she would regain.

By March 2009, the child had improved, but still had significant problems. At five years old, she was still not potty trained and smeared her feces all over everything. Only 75 percent of her speech was intelligible with attentive listening. She was ambulatory but with an unsteady gait. She still had difficulty completing tasks and could not stay at an activity without refocusing or redirection from an adult.

In April 2009, a contested hearing was held to consider the mother's 388 petition, which sought to have the child placed with the maternal aunt. The aunt is a 28-year-old single woman with no children. The aunt claimed she had a significant bond with the child, since the child's birth, and desired to have the child live with her. The aunt, although trained as a nurse, was then unemployed and willing to provide 24-hour care of the child. At the time, April 2009, the department opposed placement, recommending that the child remain in her current placement. The department also expressed concern that the aunt did not fully understand the nature of the commitment, and that at the aunt's young age she was not able to make a lifelong commitment to the child. There was also concern that the mother and maternal grandparents were putting pressure on the aunt to step forward.

After considering the evidence, the trial court identified some concerns it had about the aunt's testimony, specifically the failure of any mention of her in early reports. The court reasoned that, if the bond between the aunt and the child, and the aunt's involvement in the child's life, were as strong as the aunt claimed when testifying, there

would have been an earlier assertion of the bond. The court also expressed concern that the aunt's use of the word "accident" to describe the child's injuries remained a problem with the mother, who could not accept that the injuries to the child were not accidental. The court concluded that a placement change was not in the best interests of the child, given the care she currently received and the progress seen in her recovery. The court denied the 388 petition. The mother's motion for reconsideration was denied. This petition was not appealed within the statutory time frame.

In July 2009, the department filed its report in preparation for the section 366.26 hearing, recommending that the permanent plan for the child be legal guardianship with the foster parents being appointed legal guardians with wardship continuing. The foster parents were not willing to adopt, but were willing to accept legal guardianship, if the department supervised visits between the child and the biological family. The child was doing "very well," but still functioned as a three year old, was not yet potty trained, continued to require special education services, and still needed constant care and supervision. In response, the mother filed a second 388 petition, seeking to have the permanent plan be adoption by the aunt.

At the section 366.26 hearing, the trial court heard and considered additional evidence concerning the child's current placement and progress, as well as the aunt's willingness to adopt and ability to care for the child. After considering all the evidence, the court adopted legal guardianship as the permanent plan and appointed the foster parents as legal guardians. The court denied the 388 petition, finding that there was no change in circumstances and that it would not be in the child's best interest to change her placement, in spite of the aunt's willingness to adopt the child.

The mother has appealed. The notice of appeal purports to be from the April 23, 2009, order denying the first 388 petition, as well as from the July 21, 2009, order denying the second 388 petition and establishing the permanent plan.

I. Appealability of the first order

The department contends that the mother has forfeited her right to challenge the April 23 order denying her request to place the child with the aunt because she never sought appellate review of the order. We agree.

The general rule in juvenile dependency cases is that all orders (except for an order setting a section 366.26 hearing) are appealable. (*In re Gabriel G*. (2005) 134 Cal.App.4th 1428, 1435.) Appellate jurisdiction to review an appealable order depends upon a timely notice of appeal. (*In re Elizabeth G.* (1988) 205 Cal.App.3d 1327, 1331.) If an order is appealable and no timely appeal is taken, there can be no challenge in an appeal from a more recent order to issues decided in the earlier order once the statutory time for filing an appeal has passed. (*Wanda B. v. Superior Court* (1996) 41 Cal.App.4th 1391, 1396; *In re Elizabeth M.* (1991) 232 Cal.App.3d 553, 563.) Since the mother did not appeal from or seek review of the order denying the first 388 petition, and time for appeal has passed, she may not now seek review of that order, and all issues decided by that order are res judicata. (*Wanda B. v. Superior Court, supra,* at p. 1396.)

The mother responds by arguing that, if she has forfeited her right of appellate review, she was denied effective assistance of counsel. "To succeed on a claim of ineffective assistance of counsel, the appellant must show: (1) counsel's representation fell below an objective standard of reasonableness; and (2) the deficiency resulted in demonstrable prejudice. [Citation.]" (*In re Kristen B.* (2008) 163 Cal.App.4th 1535, 1540.) Here, the mother cannot show prejudice. Her first petition sought placement with the aunt. The mother's second petition seeks essentially the same thing, only at a later point in the proceedings and after the department had announced its proposed permanent plan of legal guardianship. In both instances, the juvenile court is considering the same evidence and exercising the same discretionary power in deciding whether removing the child from the current successful placement and placing the child with the aunt is in the child's best interest. As a result, review of the order denying the first petition, had review

been preserved by a timely appeal, would have been nearly identical to our current review of the order denying the second petition. The time period between the two orders is relatively short, the record evidence is essentially the same, and nothing has significantly changed. Under these circumstances, the mother cannot show she was prejudiced by her counsel's failure to seek appellate review after the juvenile court denied the first 388 petition.

II. Denial of the second 388 petition and section 366.26 order

The mother argues that the juvenile court abused its discretion when it denied her second 388 petition seeking to have the permanent plan for the child be adoption by the aunt rather than legal guardianship with the foster parents. She claims specifically that evidence the child had improved, coupled with the aunt's willingness to adopt the child, were significant and should have resulted in a change of the child's placement. The mother further contends that the aunt should have been given preferential consideration in deciding what the permanent plan was to be, citing section 361.3, subdivision (a), although she concedes that the "linchpin of a section 361.3 analysis is whether placement with a relative is in the best interests of the minor." We review the denial of a section 388 petition and the permanent plan order for abuse of discretion. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.)

It is true that the relative placement preference afforded by the Legislature extends through the reunification period. (*In re Jessica Z.* (1990) 225 Cal.App.3d 1089; *Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023.) "[S]ection 361.3 assures interested relatives that, when a child is taken from her parents and placed outside the home pending the determination whether reunification is possible, the relative's application will be considered before a stranger's application.… When reunification fails, section 366.26, subdivision (k), assures a 'relative caretaker' who has cared for the child that, when parental rights are terminated and the child is freed for adoption, his or her application will be considered before those submitted by other relatives and strangers." (*In re Sarah*

S. (1996) 43 Cal.App.4th 274, 285; see also *In re Baby Girl D*. (1989) 208 Cal.App.3d 1489, 1493.)

Subdivision (a) of section 361.3 explains that "preferential consideration" means that the relative seeking placement shall be the first placement to be considered and investigated. The statute further provides that "whenever a new placement of the child must be made, consideration for placement shall again be given as described in this section to relatives who have not been found to be unsuitable and who will fulfill the child's reunification or permanent plan requirements." This section applies "whenever a new placement of the child must be made." (§ 361.3, subd. (d).)

The preference, however, has never been applied to remove a child already in a long-term, stable, and continuing placement just because a relative has come forward seeking custody. In this case, the child was placed with the foster parents long before the aunt stepped forward. We recognize that at least one court has stated that the relative preference applies even when no new placement is required. However, even if we were to agree with the court in *In re Joseph T.* (2008) 163 Cal.App.4th 787, a determination we need not make, the focus still centers on the best interests of the child. (§ 388, subd. (d); *In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1079-1080.) Placement with a suitable relative is presumptively in the child's best interest, but the inquiry must still be made concerning what is in the child's best interest given the particular circumstances of the case. (*In re Esperanza C.* (2008) 165 Cal.App.4th 1042, 1060.) As the court in *Joseph T.* acknowledged, "[t]he relative placement preference … is not a relative placement *guarantee* …." (*In re Joseph T., supra,* at p. 798.)

The aunt's alleged close relationship with the child and her ability to give the child a permanent home, with close ties to her biological family, are significant factors that should not be overlooked in determining the appropriate permanent plan for this child. The aunt's attempts to prepare herself and her home to take care of the child are commendable and are strong considerations in her favor. The aunt is willing to offer the

child an adoptive home and can facilitate continued close relationships with the biological mother and grandparents. Even so, the overriding concern in dependency proceedings is not the interests of the extended family but the interests of the child. (*In re Esperanza C., supra*, 165 Cal.App.4th at p. 1060.)

On the other hand, the foster parents have already established that they are able to provide excellent care to this medically fragile child, have bonded with the child, and are willing to provide her with a permanent home in the form of legal guardianship. The child was young when the foster placement was made, only three years old. The foster parents are obviously willing to facilitate the child's continued relationship with the biological family, even though the family has been somewhat overbearing in its desire to be involved in the child's life. The foster parents have requested continued department involvement to make visitation manageable.

The juvenile court was well aware of all the competing interests and considerations. It exercised its discretion and concluded that in this case, the best interest of the child is to remain with the foster parents, who have cared for her for two years. The child has bonded with the foster parents, has suffered through severe medical challenges with their help, and has thrived under their care. (See *In re Jasmon O.* (1994) 8 Cal.4th 398, 419-422 [existing psychological bond between dependent children and their caretakers is extremely important factor bearing on any placement issue].)

In determining the child's best interest, the goal is assuring stability and continuity for the child. "'When custody continues over a significant period, the child's need for continuity and stability assumes an increasingly important role.…'" (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) When a current placement has been successful over a lengthy period of time, this supports a conclusion that maintaining the current arrangement is in the best interest of the child. (*Ibid*.)

Without a doubt, care of this child will be very challenging. The foster parents have already developed a strong network of support and resources to care for her and the

other medically fragile children in their home. They know the task they are undertaking. The aunt, on the other hand, does not fully comprehend the extended nature of this commitment to a child who will require care 24 hours a day, 7 days a week, 365 days a year. Her circle of support includes the mother and the maternal grandmother, both of whom have been determined to be unsuitable caregivers for the child.

A reviewing court may not disturb the discretionary call of a juvenile court unless it has exceeded the limits of its discretion by making an arbitrary, capricious, or unreasoned call. (*In re Stephanie M., supra,* 7 Cal.4th at pp. 318-319.) We cannot say the trial court abused its discretion in denying the second 388 petition or in ordering that the permanent plan for the child be legal guardianship with the foster parents.

DISPOSITION

The orders denying the 388 petition and establishing the permanent plan are affirmed.

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Wiseman, Acting P.J.

WE CONCUR:

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Cornell, J.

_____
Dawson, J.